

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

BOB DUDNEY,

Plaintiff and Respondent,

v.

JASON CARLS et al.,

Defendants and Appellants.

A153904

(Sonoma County
Super. Ct. No. SCV-260090)

Bob Dudney sued Martin, Jason, and Stacy Carls¹ for theft and concealment of gold and other precious metals allegedly belonging to him. Jason and Stacy appeal from an order denying their special motion to strike Dudney’s second amended complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16).² The trial court determined the statute did not apply because Jason and Stacy failed to show any of Dudney’s causes of action arise out of an act in furtherance of their rights to petition or free speech. We affirm.

BACKGROUND

A.

SLAPP is an acronym for “strategic lawsuits against public participation.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1.) The Legislature adopted the anti-SLAPP statute in 1992, finding “it is in the public interest to encourage continued

¹ We use first names for clarity when referring to individual members of the Carls family. Martin is not a party to this appeal.

² Undesignated statutory references are to the Code of Civil Procedure.

participation in matters of public significance, and . . . this participation should not be chilled through abuse of the judicial process.” (§ 425.16, subd. (a).) The anti-SLAPP statute does not bar liability for claims arising from protected rights. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) Instead, it weeds out meritless claims at an early stage of the litigation. (*Ibid.*) Section 425.16, subdivision (b)(1) provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Protected acts in furtherance of speech and petition rights include written and oral statements made in judicial proceedings. (§ 425.16, subd. (e).)

B.

Dudney and Martin are former domestic partners who lived in a San Francisco duplex for about 10 years. Jason and Stacy lived in the duplex’s lower unit for several of those years. Jason is Martin’s son, and Stacy is Jason’s wife. The duplex was sold in a 2011 foreclosure. Dudney and Martin separated in approximately November 2016.

In January 2017, Dudney filed his complaint against the Carls, alleging he and Martin purchased, with proceeds obtained through joint efforts, significant amounts of gold and other precious metals intended to support them in retirement. Dudney had installed a safe under the floor of the lower unit in the duplex. According to Dudney, Jason and Stacy took precious metals belonging to Dudney and Martin from the safe. Shortly before Jason and Stacy moved out of the duplex, Dudney and Martin discovered over \$700,000 in precious metals were missing. Dudney also asserted tort and breach of contract claims against Martin.

After filing suit, Dudney sought an ex parte order allowing him to inspect the Carls’ safety deposit boxes. Over the Carls’ objections, the trial court allowed Dudney with his attorney to inspect and inventory their safety deposit boxes containing precious metals. Ten days later, Dudney filed a motion requesting injunctive relief and an

accounting of the use of the precious metals. In a declaration supporting that motion, Dudney's counsel stated the Carls had "resisted or avoided providing an inventory or any information about what happened to the coins, precious metals, and other assets" and Dudney's inspection demands had been met with continuing objections.

Jason and Stacy demurred to the complaint. Dudney admitted the statute of limitations for a theft cause of action had run and realleged the same causes of action in a first amended complaint. Jason and Stacy demurred again, raising the statute of limitations. The trial court sustained the demurrer but granted leave to amend.

Dudney filed the operative second amended complaint asserting causes of action against Jason and Stacy for negligent infliction of emotional distress, fraudulent transfer, and fraudulent concealment. Dudney repeats his allegations regarding the initial theft by Jason and Stacy. In his fraudulent transfer and fraudulent concealment causes of action, Dudney alleges an ongoing conspiracy to deprive him of his interest in the precious metals by transferring, hiding, and concealing assets. He alleges: "Commencing in or about September 2011, Defendants . . . knowingly conspired together to wrongfully abscond with, conceal the pilfering of, and otherwise deny [Dudney] his undifferentiated interest in the whole of the precious metals being held in their home safe. To this end, Defendants pretended that the home safe had been 'robbed' by some unknown third party, and fraudulently concealed the true facts from [Dudney]."

The motion to strike at issue here focuses in part on two references to litigation in the second amended complaint. Dudney alleges on information and belief that, "[a]s part of the ongoing civil conspiracy . . . to 'cover up' [the initial theft], Defendants . . . have continued to fraudulently conceal such an improper asset transfer from [Dudney] *during the course of this very lawsuit.*" (Italics added.) Further, "both during the time Jason and Stacy . . . lived in [the] San Francisco home, and continuing to the present, [Martin] has transferred gold and silver coins and other assets that were jointly owned by [Martin and Dudney]. [Dudney] believes that the transfers were done at the insistence and urging of Jason and Stacy . . . to hide the assets from [Dudney] and deprive him of access to and recovery of the property. Specifically, during the years preceding filing this action and

continuing, [Martin] in conspiracy with Jason and Stacy . . . moved coins and other property from [Martin's] control to the possession and control of Jason and Stacy This is based in part on *all three Defendants' resistance to and refusal to allow inspection of their respective safety deposit boxes, failure to provide a comprehensive accounting despite numerous requests*, and Jason[']s] and Stacy[']s] . . . continued spending and improvement to their home that appear to exceed their income and resources otherwise available.” (Italics added.)

C.

Jason and Stacy filed a section 425.16 motion to strike Dudney's entire second amended complaint. They argued Dudney's second amended complaint “arises from an act in furtherance of their right to free speech,” specifically their statements in response to Dudney's requests for inspections and an accounting. The trial court denied the motion. It explained: “[Dudney] pleads nothing showing that the lawsuit or any cause of action is based on, or arises from, protected activity. . . . [T]he conduct from which the claims actually arises consists solely of taking, without permission, property, hiding it, and fraudulently transferring it in order to deprive [Dudney] of that property in which he has an interest.”

DISCUSSION

Jason and Stacy contend they are being sued for litigation conduct protected under the anti-SLAPP statute, including discovery responses and the declarations they filed in opposition to Dudney's accounting and inspection requests. We disagree.

A.

We independently review the trial court's ruling on an anti-SLAPP motion. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) Anti-SLAPP motions are evaluated in two steps. In the first step, the defendant bears the burden of identifying the allegations of protected activity and the claims for relief supported by them. When there are allegations of both protected and unprotected activity, the court disregards the unprotected activity at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, it

proceeds to the second step, in which the burden shifts to the plaintiff to demonstrate that the challenged claims are legally sufficient and factually substantiated. If not, the claim is stricken. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 396.)

B.

In *Park*, our Supreme Court explained, in the first step, how to determine when a claim has a sufficient nexus to protected conduct. The court held “a claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.” (*Park*, *supra*, 2 Cal.5th at p. 1060.) Thus, we must examine the elements of the relevant claims and distinguish between protected conduct that forms the basis for liability and protected conduct that merely provides evidentiary support or context for the claim (*id.* at pp. 1062, 1064, 1065) or is incidental to the claim. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 394.) The causes of action Dudney alleges against Jason and Stacy are for negligent infliction of emotional distress, fraudulent transfer, and fraudulent concealment. Although Jason and Stacy do not address these causes of action with any particularity, we review each of them to determine whether it is based on protected conduct. (See *Park*, *supra*, 2 Cal.5th at pp. 1067–1068.)

1.

Negligent infliction of emotional distress is a restatement of the tort of negligence, for which duty, breach of duty, causation, and damages are the applicable elements. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.) Dudney’s complaint alleges Jason and Stacy (in conspiracy with Martin) took precious metals from the safe, pretended a third party robbed the safe, hid the precious metals from Dudney, knew or should have known that doing so would cause Dudney emotional distress, and caused him emotional and financial damages.

Jason and Stacy do not explain how this cause of action is based on protected conduct other than to argue obliquely that their resistance to discovery is part and parcel of the allegation that they continue to hide the precious metals. But the basis of the claim—the conduct that caused Dudney’s emotional distress—is that they allegedly took

the precious metals, hid them, and refuse to return them. (See *Park, supra*, 2 Cal.5th at p. 1068.) The fact that the dispute later spilled into litigation, and the defendants have resisted discovery related to the whereabouts of the property, is incidental to the claim.

2.

Dudney's cause of action for fraudulent transfer appears to be based on Civil Code section 3439.04, subdivision (a), which provides: "A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor." Dudney alleges Martin transferred coins and other assets, in which Dudney has an interest, to Jason and Stacy "in order to hide them and avoid returning them . . . to [Dudney.]"

Rather than any protected activity, this cause of action is based on the alleged acts of transferring property. (See *Episcopal Church Cases* (2009) 45 Cal.4th 467, 478 ["additional fact that protected activity may lurk in the background . . . does not transform a property dispute into a SLAPP suit"].) Dudney wants to recover his share of the precious metals purportedly taken. Even if we assume that Dudney is referring in part to the discovery dispute when he alleges that the Carls "refuse to disclose the amounts and locations of the coins and other assets," the allegation is incidental to the cause of action.

3.

The third and last cause of action is for fraudulent concealment. Fraudulent concealment requires " '(1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact.' " (*Hambrick v. Healthcare Partners Medical*

Group, Inc. (2015) 238 Cal.App.4th 124, 162.) Jason and Stacy focus largely on allegations related to this claim.

In his complaint, Dudney alleges: “Defendants have conspired to transfer assets in which [Dudney] has an interest and to hide and conceal them to avoid [Dudney] knowing where they are, what is left, and being able to recover them. [¶] . . . [Dudney] has *attempted to discover these facts* and Defendants have continued to refuse to provide the information about where the assets are, how much is there, and what happened to the original coins, precious metals and other assets, where they were hidden or transferred and to whom since [Dudney] lived in the same residence as Defendants, and afterwards. Despite the attempts to learn the information from Defendants, [Dudney] does not know where the assets are or what happened to them.” (Italics added.) Jason and Stacy argue that Dudney is referring to the discovery dispute when he alleges he “attempted to discover these facts.”

Jason and Stacy also point to allegations that expressly refer to the lawsuit and the discovery dispute: “As part of the ongoing civil conspiracy . . . to ‘cover up’ [the theft], Defendants . . . have continued to fraudulently conceal . . . an improper asset transfer from [Dudney] *during the course of this very lawsuit.* [¶] . . . [¶] . . . [Dudney] believes that the transfers were done at the insistence and urging of [Jason and Stacy] to hide the assets from [Dudney] and deprive him of access to and recovery of the property. Specifically, during the years preceding filing this action and continuing, Martin . . . in conspiracy with Jason and Stacy . . . moved coins and other property from [Martin’s] control to the possession and control of Jason and Stacy *This is based in part on all three Defendants’ resistance to and refusal to allow inspection of their respective safety deposit boxes, failure to provide a comprehensive accounting despite numerous requests,* and [Jason’s] and [Stacy’s] continued spending and improvement to their home that appear to exceed their income.” (Italics added.)

Finally, Jason and Stacy cite a declaration filed by Dudney, in opposition to an earlier demurrer, in which he contends the Carls have been evasive and misleading when they responded to discovery concerning the location of the precious metals, which in

Dudney's view is evidence of their intention to hide that property from his rightful possession.

Thus, Dudney does allege at least some concealment made in the context of litigation. Oral and written statements made in court, or in connection with an issue under review by a court, are protected petitioning activities covered by the anti-SLAPP statute. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116; § 425.16, subd. (e)(1), (2).)

In *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624 (*Jespersen*), plaintiffs sued their former attorneys for malpractice after the attorneys' representation in a prior lawsuit led to terminating sanctions for discovery violations. (*Id.* at pp. 627–628, 631.) The attorney defendants filed an anti-SLAPP motion, arguing the malpractice suit arose out of a declaration they had submitted, in the earlier suit, admitting misconduct. (*Id.* at pp. 628–629, 631–632.) Although the reviewing court recognized the declaration supplied “evidence of [the attorneys’] conduct” (*id.* at p. 631), this was deemed insufficient to carry the first-step burden. The attorney defendants were not sued for filing the declaration, but for the underlying misconduct—i.e., failing to timely respond to discovery requests and failing to comply with a court order. (*Id.* at pp. 631–632.)

Jason and Stacy make no attempt to distinguish *Jespersen*. As in that case, the allegations and declarations Jason and Stacy cite are, at most, inartful references to evidence of liability. Dudney is suing Jason and Stacy for allegedly taking and concealing Dudney's property, not for resisting discovery. We agree with the trial court that Dudney's negligent infliction of emotional distress, fraudulent transfer, and fraudulent concealment causes of action do not arise from protected activity. We do not reach the second prong of the anti-SLAPP analysis or otherwise address the merits of Dudney's claims.

C.

Dudney seeks sanctions against Jason and Stacy for filing a frivolous appeal. (See § 425.16, subd. (c)(1); Cal. Rules of Court, rule 8.276.) He requests \$11,220 in attorney fees incurred in the appeal, contending the appeal is frivolous because Jason and Stacy

did not “grapple with [*Park, supra*, 2 Cal.5th 1057].” Although Jason and Stacy have not prevailed on their appeal, and their failure to discuss the most pertinent legal authority is troubling (see *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 32), we deny Dudney’s motion because he has not demonstrated “any reasonable attorney would agree that the appeal is totally and completely without merit.” (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Nor has Dudney shown Jason and Stacy maintained this appeal solely to harass him or to cause delay. (See *ibid.*; Cal. Rules of Court, rule 8.276(a)(1).)

DISPOSITION

The order denying the special motion to strike is affirmed. Dudney is entitled to his costs on appeal.

BURNS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.

A153904